

TCEQ DOCKET NO. 2009-0206-DIS
TCEQ INTERNAL CONTROL NO. 06182008-D05

APPLICATION FOR CREATION	§	BEFORE THE
OF ROCKWALL COUNTY WATER	§	
CONTROL AND IMPROVEMENT	§	TEXAS COMMISSION ON
DISTRICT NO. 2	§	
	§	ENVIRONMENTAL QUALITY

APPLICANT’S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

COMES NOW, FM-548 & High Plains Trail-1237, LLLP (“Applicant”), and files this response to the hearing requests made by the Rockwall County Commissioners Court; and Texas Media Enterprise, LLC, on behalf of the *Rockwall County News*, and Wesley B. Burnett, regarding the application to create Rockwall County Water Control and Improvement District No. 2. For the reasons set out below, Applicant respectfully urges the Texas Commission on Environmental Quality (the “Commission” or “TCEQ”) to deny all hearing requests.

I. BACKGROUND

Applicant filed the application to create Rockwall County Water Control and Improvement District No. 2 (the “District”) on June 18, 2008. The application was declared administratively complete June 25, 2008. The proposed District contains approximately 619.511 acres and is located in Rockwall County, approximately two miles north of the intersection of F.M. 548 and State Highway 205. Subsequent to the filing of the application, the land within the District was included in the extraterritorial jurisdiction of the City of McLendon-Chisholm. Applicant has complied with the consent provisions of Texas Local Government Code, Section 42.042 with respect to the City of McLendon-Chisholm.

As required by Texas Water Code, Section 49.011(b), and Section 293.12(b)(1) of the TCEQ rules, 30 Texas Administrative Code, the Notice of District Petition was published by Applicant in the *Rockwall County Herald-Banner* on December 19 and 26, 2008. The Notice was also posted on the bulletin board used for posting legal notices at the Rockwall County Courthouse on January 15, 2009. *See* 30 Tex. Admin. Code § 293.12(b)(2). The Rockwall County Commissioners Court filed a hearing request with the Commission on August 28, 2008. Texas Media Enterprise, LLC, publisher of the *Rockwall County News*, and Wesley B. Burnett jointly filed a hearing request on January 26, 2009. No other hearing requests were filed regarding this application.

II. ROCKWALL COUNTY COMMISSIONERS COURT

The hearing request made by the Rockwall County Commissioners Court (the “County”) does not identify any specific interest of the County that is affected by this district creation application; therefore, the County’s hearing request should be denied. Under Section 55.255(b)(2) of the TCEQ rules, a hearing request made by an “affected person” may be granted if it: (1) complies with Section 55.251, including “identify[ing] the person’s personal justiciable interest affected by the application,” (2) is timely filed, and (3) “is pursuant to a right to hearing authorized by law.” An “affected person” is defined as “one who has a *personal* justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 Tex. Admin. Code § 55.256(a) (emphasis added). A local government entity *may* be considered an affected person, but does not automatically have standing with respect to a particular application. *Id.* § 55.256(b). Applicant would note that unlike Texas Water Code Section 54.0161, concerning review of a municipal utility district creation by the county commissioners court, Chapter 51 of the Water Code contains no provision concerning the

participation of the county in a TCEQ proceeding to create a water control and improvement district.

Because the District at issue here is proposed to have water, wastewater, and drainage powers, the Commission has jurisdiction to create the District under Section 51.333 of the Water Code. The criteria the Commission must consider in determining whether to grant an application for creation of a water control and improvement district are whether:

- (1) organization of the district as requested is feasible and practicable;
- (2) the land to be included and the residents of the proposed district will be benefited by the creation of the district;
- (3) there is a public necessity or need for the district; and
- (4) the creation of the district would further the public welfare.

Tex. Water Code § 51.021(a).

In its hearing request, the County fails to identify any specific interest of the County that would be affected by Applicant's district creation application, and in fact, the County fails even to identify any specific concern at all regarding the application. The County states only that it opposes the creation and requests a hearing. As such, the County's request does not meet the requirements of the TCEQ rules and must therefore be denied.¹

¹ The County also "requests to review any and all information relating to the proposed District that the court deems necessary" and "that the opinion of the Rockwall County Commissioners Court be considered by the Texas Commission on Environmental Quality." Although the County does not explicitly reference Section 54.0161 of the Water Code, these statements appear to be based on the provisions of that section. Again, Section 54.0161 applies only to an application for creation of a municipal utility district under Chapter 54 and therefore has relevance to an application for creation of a water control and improvement district under Chapter 51.

III. ROCKWALL COUNTY NEWS AND WESLEY BURNETT

The hearing request filed by Texas Media Enterprise LLC, on behalf of the *Rockwall County News*, and Wesley B. Burnett states that it is based on two arguments: (1) that Applicant should have published the application notice in the *Rockwall County News* rather than in a competing newspaper; and (2) that Mr. Burnett is “an individual Rockwall County resident to whom the requirement of published notice is directed.” The request does not identify any “personal justiciable interest affected by the *application*” of either the *Rockwall County News* or Mr. Burnett. The request does not raise any issue whatsoever related to the substantive criteria listed above that the Commission must consider in deciding whether to grant an application to create a water control and improvement district.

As to Mr. Burnett in particular, he fails to meet the requirement of Section 55.251(c)(2) that his request include “a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public.” The request states only that Mr. Burnett is a resident somewhere in Rockwall County. Under Section 55.256(a) of the Commission’s rules, “[a]n interest common to members of the general public does not qualify as a personal justiciable interest.”

As to the *Rockwall County News*, its hearing request is essentially a complaint that Applicant chose to publish the application notice in a competing, equally qualified newspaper rather than giving that business to the *Rockwall County News*. The claims in the request letter regarding the law applicable to district creation notices are wholly inaccurate. The letter first alleges, incorrectly, that Applicant was required to publish notice of the application “in a ‘newspaper of general circulation in the county’ where the facility is located, and any adjoining

county wherein any potential affected person may reside.” The applicable law, Section 49.011(b) of the Water Code, actually provides as follows:

The commission by rule shall establish a procedure for public notice and hearing of applications. The rules must require an applicant to publish the notice issued by the commission under Subsection (a) once a week for two consecutive weeks *in a newspaper regularly published or circulated in the county where the district is proposed to be located* not later than the 30th day before the date on which the commission may act on the application.

(Emphasis added.)

Requiring publication in a newspaper that is “regularly published or circulated” is a different standard than requiring publication in a “newspaper of general circulation.” The term “newspaper of general circulation” is a term of art specifically used by the legislature in many Texas statutes concerning publication of notices, but the legislature chose not to apply that requirement to district creation applications. *See* Op. Tex. Att’y Gen. No. JC-0223 (2000) (discussing various statutes requiring publication in a “newspaper of general circulation” and defining that term).

The *Rockwall County News* next asserts, again incorrectly, that Section 2051.044 of the Texas Government Code defines the term “newspaper” and that the application notice was required to be published in a newspaper meeting the requirements of that statute. Section 2051.044 of the Government Code does not apply to publication of the notice for a district creation application. Section 2051.044 does not define the term “newspaper” for purposes of all published notices required under any Texas law; rather, that section specifies the type of newspaper that must be used for a published notice that is subject to Chapter 2051, Subchapter C of the Government Code. That Subchapter applies only to publication of a notice by a governmental entity. Tex. Gov’t Code § 2051.042(a); *see also id.* § 2051.041 (defining

“governmental entity,” “governmental representative,” and “notice”). Section 49.011(b) of the Water Code specifically requires the *applicant* to publish notice of its district creation application. *See also* 30 Tex. Admin. Code § 293.12(b) (providing that “applicant shall cause the notice to be published”). Applicant is a private landowner. The request letter acknowledges that Applicant was responsible for publishing the application notice.

Furthermore, Section 2051.042(a) of the Government Code provides that Chapter 2051, Subchapter C

applies only to the extent that the general or special law requiring or authorizing the publication of a notice in a newspaper by a governmental entity does not specify the manner of the publication, including the number of times that the notice is required to be published and the period during which the notice is required to be published.

Section 49.011 of the Water Code, the law requiring published notice here, does specify the manner of publication for a district creation notice (in a newspaper regularly published or circulated in the county where the district is proposed to be located), including the number of times (two) and the period during which the notice must be published (once a week for two consecutive weeks). Therefore, even if the notice at issue here *were* required to be published by a governmental entity, Government Code Chapter 2051, Subchapter C, including Section 2051.044, would still be inapplicable.

Applicant has fully complied with the only applicable notice requirements, those set out in the Water Code and the Commission’s rules. As confirmed by the Affidavit of Publication provided by the *Rockwall County Herald-Banner*, that newspaper is regularly published or circulated in Rockwall County, and notice of the application was published once a week for two consecutive weeks, all as required by Section 49.011(b) of the Water Code. *See* Attachment 1 (affidavit). The arguments of the *Rockwall County News* concerning the published notice for the


application are wholly without merit. It has not raised any other issue. As it has failed to show that it has any personal justiciable interest affected by the application, its hearing request, along with that of Mr. Burnett, must be denied.

IV. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, FM-548 & High Plains Trail-1237, LLLP hereby respectfully urges the Commission to deny all hearing requests and grant the application to create Rockwall County Water Control and Improvement District No. 2.

Respectfully submitted,

COATS, ROSE, YALE, RYMAN & LEE, P.C.

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ATTORNEYS FOR FM-548 & HIGH PLAINS
TRAIL-1237, LLLP

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on this 29th day of June, 2012 on the following:

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Angela M. Stepherson

Attachment 1

TCEQ-OFFICE OF THE CHIEF CLERK
MC-105 Attn: Notice Team
PO Box 13087
Austin TX 78711-3087

Rockwall County WCID 2
TCEQ IC No. 06182008-D05 CID # 64998
Notice of District Petition - Creation

AFFIDAVIT OF PUBLICATION

STATE OF TEXAS

COUNTY OF Hunt

Before me, the undersigned authority, on this day personally appeared

Lisa Chappell

(name of newspaper representative)

, who being by me duly sworn,

deposes and says that (s)he is the

Publisher

(title of newspaper representative)

of the Rockwall County Herald-Banner

(name of newspaper)

published or circulated in

Rockwall

(name of county or counties)

County/Countries.

Texas; that the attached notice was published in said newspaper on the following dates:

December 19th + 26th, 2008

(date or dates of publication)

[Signature]
Newspaper Representative's Signature

Subscribed and sworn to before me this the 30 day of December.

20 08 to certify which witness my hand and seal of office.

[Signature]
Notary Public in and for the State of Texas

Cheri Casto
Print or Type Name of Notary Public

My Commission Expires 12-09-2010

(Seal)

